

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 2001 Session

TERRY LEE MATTHEWS v. LARRY OUTLAND, ET AL.

**Direct Appeal from the Circuit Court for Humphreys County
No. 8441 Robert E. Burch, Judge**

**No. M1998-00578-WC-R3-CV - Mailed - October 5, 2001
Filed - November 7, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with *Tennessee Code Annotated* §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The plaintiff, a logger employed by L&L Logging Co. who was injured when a tree fell on him, appeals the judgment of the trial court in which the trial court found: 1) that Waverly Wood Products, a sawmill, was not a statutory employer under *Tennessee Code Annotated* § 50-6-113 and 2) the plaintiff had sustained a 10% permanent partial disability to the body as a whole. After a complete review of the entire record, the briefs of the parties, and the applicable law, we affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court Affirmed.

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR.,J., and JOE C. LOSER, JR., SP.J., joined.

Joe Bednarz and Joe Bednarz, Jr., Nashville, Tennessee, for the appellant Terry Lee Matthews.

Blakeley D. Matthews and Kristen Murphy Anderson, Nashville, Tennessee, for the appellee Waverly Wood Products, Inc.

MEMORANDUM OPINION

Mr. Terry Lee Matthews was 34 years old at the time of trial and had an eleventh grade education. His employment history includes gunneling boats and working in fast food restaurants and construction. In the late 1980's to early 1990's, Mr. Matthews went to work for Mr. Larry Outland and L&L Logging Company. His job duties included cutting logs to specified lengths, working on equipment, picking up parts and doing other errands as needed for Mr. Outland.

Mr. Outland had had a long history of business dealings with Mr. James Richardson. Mr. Richardson, owner of Waverly Stave Co. and Richardson Lumber Co., had been in the lumber business for many years.

In August 1992, Todd Richardson, son of James Richardson, started Waverly Wood Products, Inc., a sawmill, with a loan from Richardson Lumber Co. Waverly Wood Products also leased its operating equipment from Richardson Lumber Co. Todd Richardson was the president and sole shareholder of the corporation and James Richardson was employed as secretary-treasurer receiving an annual salary of \$18,000. Waverly Wood Products bought logs from more than 20 different vendors.

In 1993, Richardson Lumber Co. bought the property where the accident occurred and later sold it to a Jack and Margaret Johnson for \$119,000¹ while retaining the timber rights. Richardson Lumber Co. thereafter sold the timber rights to L&L Logging Co. and Larry Outland for \$44,556.60 on December 7, 1993.

On December 31, 1993, L&L Logging and Mr. Outland, individually, purchased logging equipment from Richardson Logging Company for \$77,000 via a purchase money promissory note in favor of Waverly Wood Products, Inc., and a corresponding security interest in said equipment to Richardson Lumber Co. A sub-clause in each of the financing and security documents stated that Larry Outland and L&L Logging would sell logs to Waverly Wood and repayment amounts would be calculated at \$2.50 per ton of logs and pulpwood with a minimum payment of \$2,000 per month. The subclause also provided that if such deliveries ceased, the full loan amount would be due within 30 days of the date of the last delivery.

According to Mr. Outland, payment was taken out of each of his deliveries to Waverly Wood Products. It was his understanding that so long as he paid \$2,000 per month he could sell the wood to another company and make the payments. He did not sell logs to any other company besides Waverly Wood Products in 1994. Mr. Outland saw Mr. Richardson as a creditor.

Mr. Outland determined where to cut the timber and what type of trees would be cut. He had exclusive control over the hiring and firing of his employees.² Mr. Outland provided all the equipment and set his employees' wages. He also determined to whom to sell his logs and pulpwood based upon which sawmill was "paying the most."

¹The contract provided that Richardson Lumber Co. would convey title to the property via general warranty deed upon payment in full of the purchase price to be paid in monthly installments of \$894.01.

² He had fired Mr. Matthews in the past for marijuana use on the job. He later re-hired him after Mr. Matthews informed him he had stopped using marijuana.

Mr. Matthews testified that Mr. Richardson obtained the timber for Mr. Outland, and would come out to the job site 2 or 3 times a month. He also stated a timber cruiser for Waverly Wood Products would come out to measure cut logs and verify their length. Mr. Matthews admitted that neither of the Richardsons could hire or fire him, set his wages, control his job duties or set his schedule. He agreed that Mr. Outland was “the boss.”

After James Richardson’s accountant advised him that Richardson Lumber Co. was in danger of being classified as a holding company due to an excess of lease income, Todd Richardson elected to close Waverly Wood Products, Inc., in August of 1994. Richardson Lumber Co. bought out the assets of the company and began running it as a new business entity, Waverly Wood. As of the time of trial, Mr. Outland was still making payments on the note, had made no deliveries to Waverly Wood Products for over a year and the loan had not been called.

On February 2, 1994, L&L Logging was cutting timber on the land where Mr. Outland owned the timber rights. Mr. Matthews was cutting logs when a tree fell on him. He was taken to an area hospital, diagnosed with a T-12 compression fracture, and transferred to Vanderbilt Medical Center for further treatment.

Dr. Michael McNamara, M.D., orthopedist, examined Mr. Matthews and found “tenderness over the chest wall with no evidence of any strong contusion or fracture.” Mr. Matthews reported a “pins and needles” sensation throughout his right lower extremity.

Dr. McNamara found that a portion of Mr. Matthews’ T-12 vertebra, located in the middle of the back, had been crushed. A CAT scan and an MRI did not reveal any spinal canal compromise, cord contusion, or ligamentous damage. However, in Dr. McNamara’s opinion, Mr. Matthews had sustained some form of spinal cord injury because his sensory exam reflected some form of neurologic damage. Dr. McNamara placed Mr. Matthews in a removable plastic body brace. He was discharged from Vanderbilt on February 10, 1994.³

Mr. Matthews continued to see Dr. McNamara for follow-up care complaining of pain in his right leg. Magnum motor exams and sensory exams were normal. Dr. McNamara stated that the fracture gradually healed without difficulty, but he had had a spinal cord injury with “significant dysesthetic pain” in his right leg that made it difficult for him to walk. However, this pain gradually improved.

Another MRI performed in March of 1995 revealed no evidence of neurocompression of malignment of the spine, and Dr. McNamara did not believe Mr. Matthews was a candidate for surgical treatment.

³ At trial, Mr. Matthews stated he was in the hospital for “twenty-something-odd” days, but the record reflects he was discharged 8 days after the accident.

Dr. McNamara opined that Mr. Matthews had reached maximum medical improvement on April 7, 1995, and assigned a 23% permanent partial impairment to the body as a whole. This rating addressed his subjective right leg pain as well as complaints of sexual dysfunction first reported on April 7, 1995, some 14 months after the work injury. He also noted that Mr. Matthews' impairment rating relating only to his complaints of burning and tingling in his right leg would have been 15%.

Dr. McNamara last saw Mr. Matthews in December of 1996. He continued to complain of burning and tingling in his right leg and some decreased sexual function. Dr. McNamara stated that these symptoms were consistent with the type of injury he had sustained. He agreed that dysesthetic pain was a subjective symptom. He also found that activity aggravates the pain in Mr. Matthews' right leg making it not safe for him or his co-workers for Mr. Matthews to return to the logging industry.

An ex-girlfriend, Ms. Thelma Wessles, testified that Mr. Matthews' physical abilities were not affected by the accident, that he did chores around the house and would only complain of hurting when they went out or were around other people.

At the time of trial, Mr. Matthews was working full time as a department salesperson at Home Depot with no accommodations for any physical disabilities. His job duties included loading lumber and moving supplies on occasion.

Mr. Matthews filed a complaint for workers' compensation benefits against Larry Outland⁴, Larry Mallard, L&L Logging, Waverly Wood Products and James Richardson. He alleged, among other things, that Waverly Wood Products and James Richardson were statutory employers pursuant to Tennessee Code Annotated § 50-6-113. On the morning of trial, Mr. Matthews voluntarily dismissed Mr. James Richardson, individually, from the lawsuit.

The trial court made the following findings of fact:

1) That the Plaintiff was a full time employee of the Defendants, Mr. Outland and Mr. Mallard. They controlled the hours he worked, controlled his manner of work, controlled his pay, and the employer furnished tools.

2) That the "Independent Contractor" employment contract is a nullity.

3) That the facts establish a contractual obligation of L&L Logging Company to sell only to Waverly Wood Products, Inc., at the time of the accident. However, this provision was not enforced

⁴As of the date of the accident, Mr. Outland had not purchased workers' compensation insurance for his employees, believing that they had agreed to a contract by which they were engaged as independent contractors. Mr. Outland claimed that he did not know that this type of contract was not legally binding at the time of Mr. Matthews' work accident, and has since obtained workers' compensation insurance for his employees.

between the parties.

4) That Mr. James Richardson had no right to control Waverly Wood Products, Inc., nor L&L Logging Company. James Richardson was simply trying to help his son in his dealings with L&L Logging Company, but was under no contractual obligation to do so.

5) The only evidence presented to establish the element of control over L&L Logging was the plaintiff's testimony, and the Court found that the Plaintiff's testimony was not credible.

The trial court made the following conclusions of law:

1) L&L Logging Company was not a subcontractor of Waverly Wood Products, Inc.

2) There was no control of L&L Logging Company by Waverly Wood Products, Inc. Any influence of James Richardson on L&L Logging Company was not attributable to Waverly Wood Products, Inc. Waverly Wood Products, Inc., was not a principal contractor and had no connection to the plaintiff.

3) The defendants, Larry Outland and Larry Mallard, are liable to plaintiff for workers' compensation benefits.

4) The plaintiff's anatomical impairment rating of 23% includes sexual dysfunction which does not relate to employability; and most of the plaintiff's symptoms are subjective. As found earlier, the plaintiff is not a credible witness.

The trial court entered judgment against Larry Outland and Larry Mallard d/b/a L&L Logging Co. for \$17,319.00 in medical bills, temporary total disability benefits and permanent partial disability benefits based upon 10% permanent partial disability to the body as a whole.

ANALYSIS

Review of findings of fact by the trial court shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann. § 50-6-225(e)(2). Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is

able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

I. Whether the trial court erred in finding that Waverly Wood Products, Inc., was not a statutory employer of Mr. Matthews.

Tennessee Code Annotated § 50-6-113 provides:

(a) A principal, or intermediate contractor, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal, intermediate contractor, or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

* * *

(d) This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under the principal contractor's control or management.

The purpose of this provision is to "to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation for their workers." *Brown v. Canterbury Corp.*, 844 S.W.2d 134,136 (Tenn. 1992).

A company or other business is considered a principal contractor if the work being performed by a subcontractor's employees is part of the regular business of the company or is the same type of work usually performed by the company's employees. *Murray v. Goodyear Tire & Rubber Co.*, 46 S.W.3d 171, 176 (Tenn. 2001).

Waverly Wood Products employees made logs into staves and sold those products. The uncontroverted testimony established that Waverly Wood Products, Inc, did not have employees harvest timber. The company regularly bought logs from twenty or more different vendors. It is clear from the record that the employees of L&L Logging were not engaged in work usually or even sporadically performed by Waverly Wood Products employees.

As the Supreme Court in *Murray*, recently stated:

[E]ven if a company contracts out work other than the type of work usually performed by its employees, that company may nevertheless be considered a

principal contractor based on the right of control over the conduct of the work and over the employees of the subcontractor. We emphasize that the control test is satisfied if the proof demonstrates that the alleged employer had a *right to control*, regardless of whether this right was actually exercised.

Id. (citations omitted).

After reviewing the record we find that Waverly Wood Products did not have or exercise a right of control over Mr. Outland's employees or the conduct of their work. Mr. Outland had exclusive control over the hiring and firing of his employees and the setting of their wages. Mr. Outland furnished the tools to his employees. Mr. Outland determined where timber would be cut first as well as determining the type of trees to be cut.

In its ruling from the bench, the trial court stated:

[T]he only testimony of record that I'm aware of that either Mr. James Richardson or Waverly Wood Products extended any control toward this alleged subcontractor of L&L Logging was by the Plaintiff, Mr. Matthews. Based on the entire proof which the Court has heard, the Court does not regard Mr. Matthews as a credible witness and therefore discounts his testimony.

The trial court was in the best position to judge the credibility of the witnesses in this case, and on review we give considerable deference to that finding. We find that the language in the financing and security agreements is not sufficient standing alone to satisfy the right to control test. After reviewing the entire record in this case we find that the evidence does not preponderate against the finding of the trial court.

II. Whether the trial court erred in finding that Mr. Matthews sustained a 10% permanent partial disability to the body as a whole.

The employee has the burden of proving every essential element of his claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992).

In all but the most obvious cases, permanency of an injury must be established by expert medical testimony in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 (Tenn.1988).

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony *Tenn. Code Ann.* § 50-6-241(c); *Worthington v. Modine Manufacturing Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The assessment of this disability is based on all pertinent factors, including lay and expert testimony, the employee's age,

education, skills and training, local job opportunities, and capacity to work at the types of employment available in his disabled condition. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991). The test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 459 (Tenn. 1988).

The trial court found that the 23% impairment assigned by Dr. McNamara included a sexual dysfunction that did not relate to employment. The trial court found “that most of [Mr. Matthews’] symptoms or reported symptoms were subjective, as the court understands and reads the deposition of Dr. McNamara. And as I have said before, the Plaintiff is not a credible witness, as far as the Court is concerned, and there has been much testimony that he is not injured so much as he would have us believe. Therefore, the Court sets his permanent partial at 10 percent.”

It is clear that after hearing Mr. Matthews’ testimony the trial court questioned the underlying facts upon which Dr. McNamara based his anatomical impairment rating and work restrictions – namely Mr. Matthews subjective complaints of pain. In addition, at the time of trial, Mr. Matthews was working at Home Depot with no restrictions where he was required on occasion to load lumber and move supplies.

After reviewing the medical testimony and the entire record in this case, we find that the evidence does not preponderate against the finding of the trial court.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the appellant.

JAMES L. WEATHERFORD, SR. J.

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the appellant, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM